

DOCKET NUMBER: 89-01809

ADV. NUMBER: 92-1258

JUDGE: M. A. Mahoney

PARTIES: Joe Morgan, Inc., Sunburst Bank, United States Fidelity and Guaranty Company

CHAPTER:

ATTORNEYS: J. E. Robertson, Jr., D. Carr, H. W. Wasden, R. H. Allen

DATE: 2/21/95

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

JOE MORGAN, INC.,

Case No. 89-01809-MAM

Debtor.

SUNBURST BANK,

Plaintiff,

v.

Adv. No. 92-1258

UNITED STATES FIDELITY
AND GUARANTY COMPANY,

Defendant.

**ORDER DENYING THE SUMMARY JUDGMENT MOTION
OF UNITED STATES FIDELITY AND GUARANTY COMPANY**

James E. Robertson, Jr., Mobile, AL for Sunburst Bank
Davis Carr and H. William Wasden, Mobile, AL for United States Fidelity and Guaranty
Company
Robert H. Allen, Mobile, AL, Trustee

This matter came before the Court on the motion of United States Fidelity and Guaranty Company ("USF&G") for summary judgment pursuant to Fed. R. Bankr. P. 7056. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(1) and 1334 and the Order of Reference of the District Court. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A). For the reasons indicated below, the motion of USF&G for summary judgment is denied.

Joe Morgan, Inc. ("JMI"), the debtor, was involved in the business of installing commercial telephone systems in several states scattered throughout the East and South. For

several years JMI had obtained from USF&G the following insurance: commercial property coverage, commercial general liability coverage, business auto coverage, crime coverage, contractors' equipment coverage, and electrical data processing coverage. The policy period relevant to this adversary proceeding was from May 28, 1989 through May 28, 1990.

On September 13, 1989, JMI filed a petition for relief under Chapter 11 of the Bankruptcy Code. On October 27, 1989, Robert H. Allen was appointed Chapter 11 Trustee. On February 16, 1990, this case was converted to a Chapter 7 and Allen was appointed as Chapter 7 Trustee. During the process of inventorying JMI's equipment, Allen determined that certain items were missing, totaling approximately \$298,745.01. The missing equipment and vehicles included trailers, plows, pumps, air compressors, blowers and trenching equipment such as sneakers, and a "Ditch Witch." According to Allen, the equipment was scattered throughout Mississippi, Alabama, Florida, Ohio and Virginia.

JMI had obtained this policy of insurance from USF&G through William E. Bullock, an independent agent in Mobile. On or about May 4, 1990, Allen submitted a claim through Bullock to be routed to USF&G. Bullock prepared the necessary forms and hand-carried the claim to USF&G. The USF&G claims representative for Mobile, Lyman Phillips, received the claim on or about May 7, 1989, and assigned the matter to a local claims adjusting company, Crawford & Company ("Crawford"), for investigation. The causes for disappearance of the various pieces of equipment were undetermined at this point and Crawford was instructed to investigate a claim under a non-waiver agreement or a reservation of rights due to the coverage questions.

Between May 8, 1990 and May 16, 1990, Mr. Ray Skinner, an adjuster with Crawford, contacted Allen and advised him that Crawford was investigating the claim on behalf of

USF&G, and requested and received Allen's assurance of cooperation. Skinner sent an unsigned letter directly to Allen on May 24, 1990 confirming his earlier request for assistance to Allen.

Allen does not recall receiving this correspondence.

The facts are disputed as to the extent and success of the investigation made by USF&G and/or its agent, Crawford. Nevertheless, on October 23, 1990, USF&G denied the claim made by Allen. On October 25, 1990, Phillips wrote Allen a letter memorializing USF&G's claim denial. Consequently, on September 15, 1992, Allen filed the underlying adversary proceeding against USF&G contesting the denial. On July 13, 1993, the bankruptcy court directed Allen to assign to Sunburst Bank the adversary proceeding against USF&G. After USF&G filed this motion for summary judgment, the bankruptcy court joined Allen as a plaintiff in this adversary proceeding.

Motions for summary judgment are controlled by Rule 56 of the Federal Rules of Civil Procedure, which has been adopted in Rule 7056 of the Federal Rules of Bankruptcy Procedure. In Rollins v. Tech South, Inc., 833 F.2d 1525 (11th Cir. 1987), the Eleventh Circuit determined that summary judgment is appropriate in cases in which there is no genuine issue of material fact. In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court determined that a judge's function is not [herself] to determine the truth of the matter asserted or weigh the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. Id. at 2510, 2511. This test is to be applied while considering the evidence in the light most favorable to the nonmoving party. Id. at 2510. In this case, JMI has produced sufficient evidence that a reasonable jury may find in its favor.

Among the issues raised in the pleadings that are disputed based upon the affidavits submitted are:

1. The timing and extent of Allen's and USF&G's investigation after the claim was filed.
2. Questions as to whether or not USF&G has a lawful basis for its denial of the claim.¹
3. Questions as to the extent and nature of Allen's and USF&G claims adjuster's contact after the claim was made.
4. Questions as to the nature and extent of Joe Morgan's and Skinner's contact.
5. Questions over the compliance of the insured.²
6. Questions as to the existence, nature and extent of USF&G's bad faith.

This is not, nor is it intended to be, an exclusive list of the genuine issues in dispute. Yet, these factors make USF&G's motion for summary judgment inappropriate.

¹As stated, this matter is a "core" proceeding pursuant to 11 U.S.C. § 157(b)(2)(A). Nevertheless, many of the issues determined by the bankruptcy court depend on state law. In the immediate case, Alabama state law will be controlling on those issues not expressly governed by the Bankruptcy Code.

²Pursuant to 11 U.S.C. § 541, any cause of action the debtor carries into her bankruptcy becomes property of the estate. The Supreme Court, in United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983), concluded that "the scope of [§ 541(a)(1)] is broad," including tangible or intangible property, as well as causes of action. 103 S. Ct. at 2313.

Pursuant to 11 U.S.C. § 323(b), the trustee (in this case, Mr. Allen), has the capacity to sue. Specifically, Mr. Allen has the right and obligation to bring an action, if appropriate, against JMI's insurance company for failure to settle a claim since Allen became the insured upon his appointment. Camp v. St. Paul Fire & Marine Ins. Co., 989 F.2d 428 (11th Cir. 1993). See also Camp v. St. Paul Fire & Marine Ins. Co., 616 So. 2d 12 (Fla. 1993).

Therefore, USF&G's motion for summary judgment is denied.

Dated: February 21, 1995

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE